

AUG 21 1987

JOSEPH F. SPANIOL, JR.
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No. 86-2066

In the Supreme Court of the United States

OCTOBER TERM, 1987

MINORU YASUI and TRUE S. YASUI, PETITIONERS**v.****UNITED STATES OF AMERICA**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the appeal of an order denying coram nobis relief was properly dismissed as moot when the petitioner died during the pendency of the appeal.

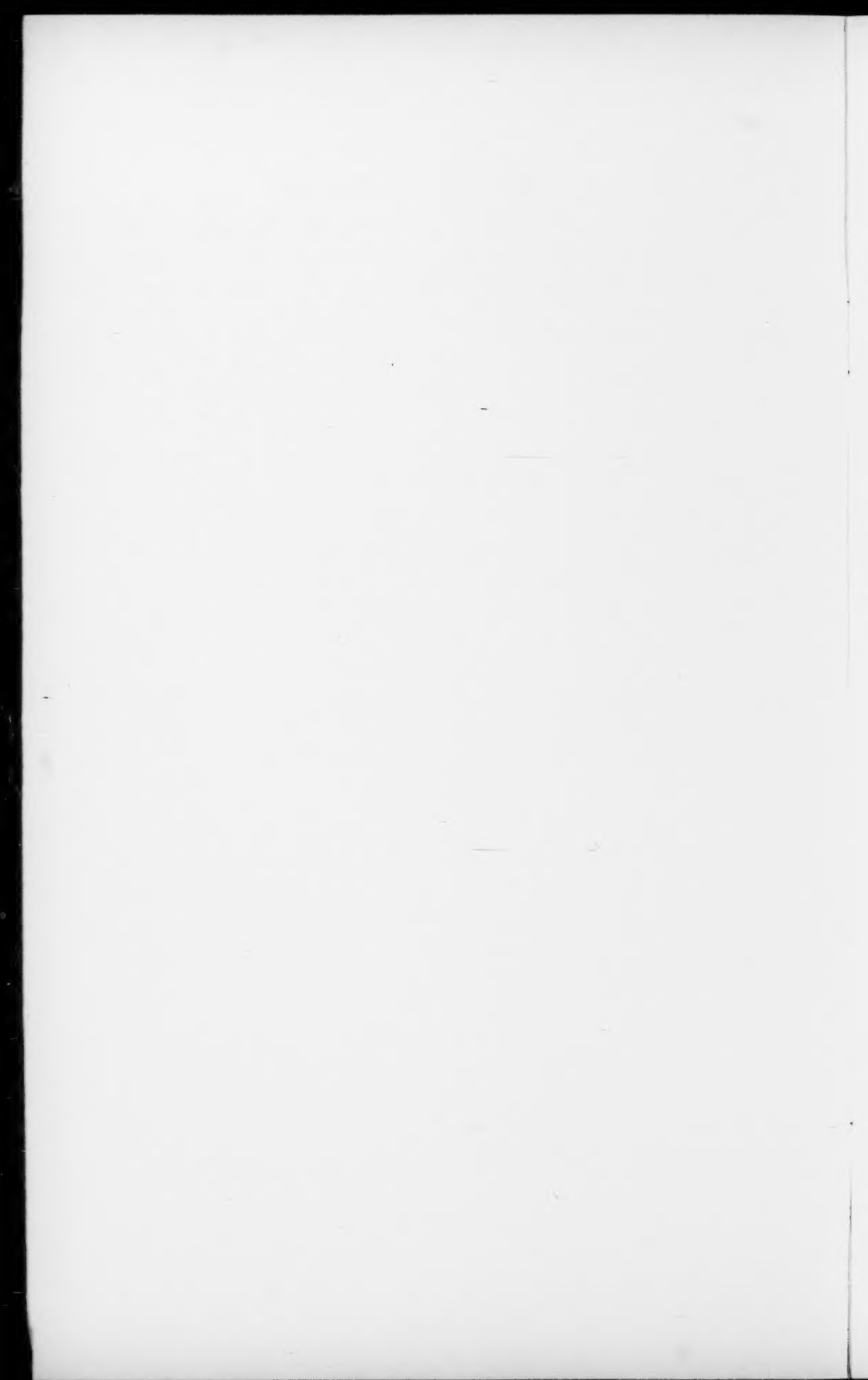


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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 40-41) is unreported. The order of the district court (Pet. App. 39-40) is also unreported. An earlier decision of the court of appeals (Pet. App. 18-37) is reported at 772 F.2d 1496. An earlier decision of the district court (Pet. App. 15-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1987. The petition for a writ of certi-

orari was filed on June 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 22, 1942, petitioner Minoru Yasui was indicted in the United States District Court for the District of Oregon under the Act of March 21, 1942, ch. 191, 56 Stat. 173 (Pet. App. 19). Pursuant to the authority of that Act, Lieutenant General John L. DeWitt, Commanding General, Western Defense Command, had issued a curfew order requiring all persons of Japanese ancestry in certain far western states to be in their homes between the hours of 8:00 p.m. and 6:00 a.m. (*id.* at 19-20). Yasui violated this curfew order and, following his indictment and trial, was convicted and sentenced to one year in prison and a \$5,000 fine (*id.* at 20). This Court affirmed Yasui's conviction on the basis of its decision in *Hirabayashi v. United States*, 320 U.S. 81 (1943), but remanded the case to the district court for resentencing. *Yasui v. United States*, 320 U.S. 115 (1943). On remand, the district court reduced Yasui's sentence to 15 days' imprisonment. *United States v. Yasui*, 51 F. Supp. 234 (D. Or. 1943).

2. Forty-one years later, on February 1, 1983, Yasui petitioned the district court for a writ of error coram nobis (Pet. App. 20). Yasui claimed that, during 1942-1943, the government had suppressed and manipulated evidence in order to create the false impression that Americans of Japanese ancestry posed a threat to national security and that, as a result, his conviction was based on erroneous information and was unconstitutionally obtained (*id.* at 20-21). Yasui requested that the district court dismiss his indictment and vacate his conviction (*id.* at 21).

In response, the government moved the court to dismiss the indictment, vacate the conviction, and dismiss the petition for a writ of error coram nobis (Pet. App. 21). Yasui opposed the government's motion, arguing that a simple dismissal of his indictment and vacation of his conviction, without a declaration that his constitutional rights had been violated, would not fully redress his claim (*ibid.*). The district court held for the government, noting that Yasui was asking the court "to make such findings forty years after the events took place," and that "[t]here is no case nor controversy since both sides are asking for the same relief but for different reasons" (*id.* at 16-17).

3. On March 2, 1984, 36 days after the district court entered its order, Yasui filed a notice of appeal (Pet. App. 22). The government moved to dismiss the appeal as untimely, arguing that the 10-day time limit on filing of notices of appeal in criminal cases, rather than the 60-day time limit on filing notices of appeal in civil cases, applies to cases involving coram nobis petitions (*id.* at 22-23). The court of appeals agreed with the government that a petition for a writ of error coram nobis is but "a step in the criminal case" and therefore that the 10-day, not the 60-day, time limit for filing a notice of appeal is applicable to a coram nobis proceeding (*id.* at 28-29, quoting *United States v. Morgan*, 346 U.S. 502, 505 n.4 (1954)). But the court remanded the case to the district court to allow Yasui to make a showing of excusable neglect pursuant to Fed. R. App. P. 4(b) (Pet. App. 29-30).

On remand, the district court found that Yasui had demonstrated excusable neglect and granted him a 30-day extension of time within which to file a notice of appeal with respect to the decision on the

merits of the dismissal order (Pet. App. 39-40). Yasui filed a notice of appeal within that 30-day period. The government, in turn, filed a notice of appeal with respect to the district court's finding on the excusable neglect issue. While these appeals were pending, Yasui died. Accordingly, the government moved that both appeals be dismissed as moot (*id.* at 41). Yasui's widow moved to substitute herself as a party of record and, concomitantly, opposed the government's motion to dismiss (*ibid.*). The court of appeals denied her motion to substitute and granted the government's motion to dismiss the appeals as moot (*ibid.*).

ARGUMENT

1. Petitioner first contends (Pet. 17-53) that the court of appeals erred in dismissing as moot Yasui's appeal from the district court's order denying *coram nobis* relief.

It is settled law that a criminal case abates upon the death of the defendant. See *Durham v. United States*, 401 U.S. 481, 483 (1971); *Menken v. Atlanta*, 131 U.S. 405, 405 (1889); *United States v. Dudley*, 739 F.2d 175, 176 (4th Cir. 1984). The same principle applies in the case of collateral attacks on criminal convictions. See, *e.g.*, *McMann v. Ross*, 396 U.S. 118 (1969) (per curiam); *Mintzes v. Buchanon*, 471 U.S. 154 (1985); *Warden v. Palermo*, 431 U.S. 911 (1977); see also *United States v. Oberlin*, 718 F.2d 894 (9th Cir. 1983).¹ Since a petition

¹ In cases in which the defendant dies while the case is pending before this Court, the Court's current practice is simply to dismiss the petition. See *Mintzes v. Buchanon*, *supra*; *Warden v. Palermo*, *supra*; *Dove v. United States*, 423 U.S. 325 (1976). By contrast, where the conviction is on direct appeal by right, the disposition is typically to dismiss the appeal and direct that the indictment be dismissed. See,

for a writ of error coram nobis is but "a step in the criminal process" and "is of the same general character as [a motion for collateral relief] under 28 U.S.C. § 2255" (*United States v. Morgan*, 346 U.S. 502, 505-506 n.4 (1954)), it follows that the court of appeals was correct in refusing to consider the merits of petitioner's appeal from the denial of the coram nobis petition. For the same reason—because the request for coram nobis relief had become moot with the defendant's death—the court of appeals was clearly correct in refusing to substitute petitioner True S. Yasui as a party in place of the decedent for the purpose of maintaining this coram nobis action.

Petitioners' attempt to draw support (Pet. 24-34) from survival statutes applicable in civil rights, maritime, and torts cases must fail. Those survival statutes apply to particular claims for monetary relief that a legislature has determined should survive the death of a litigant. But petitioner Minoru Yasui had not initiated a civil rights, maritime, or tort action for monetary relief. Rather, he had initiated a coram nobis action, and no survival statute applies to petitions seeking the dismissal of indictments and the vacation of judgments of conviction. Petitioners can-

e.g., *United States v. Dudley*, *supra*; *United States v. Oberlin*, *supra*; *United States v. Moehlenkamp*, 557 F.2d 126 (7th Cir. 1977); *United States v. Toney*, 527 F.2d 716 (6th Cir. 1975), cert. denied, 429 U.S. 838 (1976); *United States v. Fairfield*, 526 F.2d 8 (8th Cir. 1975); *United States v. Janney*, 525 F.2d 1208 (5th Cir. 1976). In this case, because the direct appeal from the conviction has long since been concluded, dismissal of the appeal from the denial of coram nobis relief was the appropriate response to petitioner's death, particularly since the district court had already dismissed the underlying indictment and vacated petitioner's conviction.

not change that result by now attempting to recharacterize his action as one for the vindication of civil rights.

Nor can petitioners draw support, as they seek to do (Pet. 34-41), from cases holding that the government's confession of error does not divest a court of jurisdiction to adjudicate a pending controversy. This case does not involve a confession of error. Rather, it involves a request by a defendant who is no longer alive for collateral relief from a criminal conviction. And, as noted above, the courts have consistently declined to entertain such challenges.

Finally, petitioners err in suggesting (Pet. 44-53) that petitions for coram nobis relief have historically survived a defendant's death in criminal cases. In their lengthy discussion of the history of coram nobis relief, petitioners cite only one case involving such a petition.² But that case, *Hauptmann v. Wilentz*, 570 F. Supp. 351 (D.N.J. 1983), did not address whether a petition for coram nobis relief survives the death of the defendant. It addressed only the question whether an application for a writ of error coram nobis must be made to the court in which the judgment of conviction was entered. And it answered that question in the affirmative—precisely because the petition for

² Several of the cases in the petition (at 48-50) involved the use of the writ of coram nobis in civil, rather than criminal, cases. Those cases are therefore inapposite. The two 19th century state criminal cases that petitioners cite (Pet. 50-51) both involved claims raised by a person acting in a representative capacity—in one case, a slave's owner, and, in the other case, the best friend of an insane defendant—but in each case the defendant was alive throughout the proceedings, so there was no issue of abatement due to the defendant's death.

coram nobis relief is but a step in a criminal case. See *id.* at 401. Thus, the development of coram nobis as a vehicle for collateral attacks on criminal convictions does not support petitioners' claim that petitions for coram nobis survive the defendant's death. To the contrary, the history of the writ shows that federal courts treat petitions for coram nobis relief as part of the criminal process, in which the proceedings traditionally abate when the defendant dies.

2. There is no merit to petitioners' suggestion (Pet. 13-17, 23, 34, 41-44) that this case must survive Yasui's death in order to vindicate the rights of Japanese-Americans interned during World War II. This case is not a class action; it does not seek any relief for other Japanese-Americans. It is an individual action; and it seeks relief only for a person who is now deceased. Moreover, the issues that the petition urges must be resolved are now pending before two federal courts of appeals. See *Hirabayashi v. United States*, No. 86-3853 (9th Cir., argued Mar. 2, 1987); *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part*, 782 F.2d 227 (D.C. Cir. 1986), *rev'd and remanded*, No. 86-510 (June 1, 1987). Thus, there is no need in this case to ignore the well-established rule that criminal proceedings abate upon the death of the defendant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1987